NO. 22,330

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *PETITIONER*,

v.

HOTEL CONQUISTADOR, INC.
d/b/a HOTEL TROPICANA, *RESPONDENT*.

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136,

73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] to enforce its order issued against respondent, Hotel Conquistador, Inc., d/b/a Hotel Tropicana (hereinafter sometimes referred to as "Tropicana"), on June 24, 1966. The Board's decision and order (R. 39-56, 77-78)[2] are reported at 159 NLRB No. 105. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Las Vegas, Nevada, where respondent operates a gambling casino and hotel.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that Tropicana violated Section 8(a)(3) and (1) of the Act by discharging employee Frank Yockman because of his union activities, and violated Section 8(a)(1) of the Act by coercively interrogating Frank Yockman and by creating an impression that it was engaging in surveillance over its employees' union activities. The facts upon which the Board's findings are based are summarized below.

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[1] The pertinent statutory provisions are reprinted in Appendix B, *infra*, pp. B1-B3.

[2] References to the pleadings, decision and order of the Board and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "GCX" or "RX" are to exhibits of the General Counsel and respondent, respectively.

A. The business of respondent

Respondent is, and has been at all material times herein, a Nevada corporation maintaining an office at Las Vegas, Nevada. During its past fiscal year, respondent purchased and received materials valued in excess of $50,000 from outside Nevada; and during the same period, respondent sold goods and services at retail in excess of $500,000 valuation (R. 40; Tr. 34-35, GCX (1)(C), para. II, GCX (l)(A), para. II).[3] Respondent's Tropicana Hotel, the *situs* of the unfair labor practices, is typical of the show place hotel casinos of the Las Vegas "Strip." It has accommodations for 700 guests and employs from 600 to 700 people. The casino has the usual gambling devices and, in addition, maintains 180 slot machines on its playing floor for the use of patrons at all hours of the day and night (R. 44; Tr. 49-50). This proceeding concerns the slot machine mechanics and, in particular, Tropicana's former head slot machine mechanic, Frank Yockmen.

B. Respondent's unfair labor practices

Frank Yockmen had worked as a gaming employee for approximately 12 years in the Las Vegas area before being hired on March 18, 1962, by Harry Farnow, supervisor of Tropicana's slot machine department (R. 44; Tr. 38, 49, 91). Yockmen became a charter member of the Union[4] on April 7, 1964, and was subsequently elected to the position of

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[3] It is settled that the Board has discretionary authority to assert jurisdiction over the Nevada gaming industry. *N.L.R.B. v. Harrah's Club*, 362 F. 2d 425, 427 (C.A. 9), cert. denied, 386 U.S. 915.

[4] American Federation of Casino and Gaming Employees.

recording secretary. When the Union began its organizational drive in May 1966, Yockmen became the chief organizer. Thus, he solicited authorization cards from the cashiers, the floormen, and the slot machine mechanics. After contacting all 30 employees in the slot machine department, he had obtained 18 signed authorization cards (R. 44; Tr. 58). Late in May 1964, Yockmen solicited supervisor Phillip Daly, who declined to sign a card but said that he would go along with the Union if that was what the men wanted (R. 44; Tr. 62-63).

In May 1964, the Union filed a petition with the Board seeking to represent a unit of gaming employees at the Tropicana (R. 44; Tr. 64-65).[5] Shortly after the petition was filed, the Company posted a copy of it in the slot machine repair shop (R. 46; Tr. 64-65). On June 1, 1964, Yockmen was working alone in the repair shop when Supervisor Harry Farnow walked in. Farnow pointed to the petition hanging on the wall and asked Yockmen if he "knew anything about this." Yockmen answered "Yes" and added that he was a member and officer of the Union. Farnow made no reply and walked out of the shop (R. 45, 46; Tr. 63, 84). About an hour later, Yockmen learned from Supervisor Daly—a close associate of Farnow—that Farnow had been quite disturbed that Yockmen had not revealed to him his union interest and activities prior to the filing of the Union's petition (R. 46-47; Tr. 85).

On August 6, 1964, Yockmen was making his rounds in the casino and stopped at the blackjack station to talk to George Harvey, a supervisor over Tropicana's dealers, whom Yockmen had known for about three years. Previous to this conversation Yockmen had heard that a list of union officers

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[5] The petition was subsequently withdrawn (R. 44).

and others active in the Union was being distributed to all the casinos and that his name, marked by two stars, was on the list (R. 45; Tr. 121). Accordingly, during the conversation with Harvey on August 6, 1964, Yockmen said, "I hear there is a list in the pit." Harvey acknowledged that he did have such a list and volunteered that Yockmen's name was on the list and was marked by two stars. Yockmen asked Harvey what was the maximum number of stars after the name of any person on the list. When told that three stars was the maximum, Yockmen remarked that since he was on the executive board of the Union, his name should have been marked with three stars (R. 45; Tr. 87-89). [6] Harvey laughed and Yockmen continued on his rounds.

Late in August 1964, Yockmen and Union Business Manager Hanley met in the Union's office to discuss an accident which Yockmen had at the Tropicana (Tr. 125). As a result of this conversation, Hanley called the Nevada Industrial Commission and requested that the Commission investigate the accident (Tr. 129). The next day, August 31, Yockmen was called into the office of paymistress Lucretia Rozelle who asked, "What does Mr. Hanley have to do with this place?" (R. 51; Tr. 90). When Yockmen asked why she wanted to know, Rozelle stated that the Nevada Industrial Commission, at Hanley's request, was coming to investigate Yockmen's accident (R. 51; Tr. 91). On the next day, September 1, 1964, Frank Yockmen was terminated (R. 48; Tr. 48, 188). His termination slip stated that the reason was "reduction in force" (R. 48; Tr. 188).

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[6] Yockmen became a member of the Union executive board on July 13, 1964 (R. 44; Tr. 57).

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board concluded that respondent had violated Section 8(a)(3) and (1) of the Act by discharging employee Frank Yockmen because of his union activities (R. 52, 77-78). The Board further concluded that respondent violated Section 8(a)(1) of the Act by interrogating Yockmen as to his union activities and by giving the impression that respondent was engaging in surveillance of union activities (R. 46, 47, 77-78).

The Board's order requires the respondent to cease and desist from the unfair labor practices found and from, in any other manner, interfering with, restraining or coercing employees in the exercise of their statutory rights. Affirmatively, the order requires respondent to offer reinstatement to employee Frank Yockmen; to pay him the wages which he lost because of the discrimination against him; and to post appropriate notices (R. 53-54, 77-78).

ARGUMENT

I.

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT RESPONDENT DISCHARGED EMPLOYEE FRANK YOCKMEN FOR HIS UNION ACTIVITIES IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT AND THAT RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERFERING WITH, RESTRAINING AND COERCING ITS EMPLOYEES IN THE EXERCISE OF RIGHTS GUARANTEED BY SECTION 7 OF THE ACT.

The Board found that respondent discharged head slot machine mechanic Frank Yockmen because of his activities on

behalf of the Union. That Section 8(a)(3) and (1) of the Act prohibits "discrimination to discourage participation in union activities as well as to discourage adhesion to union membership" is settled law. *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 39-40. Thus, the question for the Court is whether there is substantial evidence on the record as a whole to support the Board's finding that the discharge of Rank Yockmen was motivated not by legitimate business reasons, but by his union activities. See *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404; *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488; *Shattuck Denn Mining Corp., v. N.L.R.B.*, 362 F. 2d 466, 470 (C.A. 9).

Yockmen's leadership in the Union's organizing campaign in May 1964 is established by the evidence summarized above, *supra*, pp. 3,5. Moreover, respondent was fully aware of Yockmen's participation in the organizational drive. Thus, shortly after the Union's petition for representation was posted in the repair shop, Supervisor Farnow, finding Yockmen alone in the repair shop, pointed to the petition and asked him if he "knew anything about this."[7] Yockmen replied that he did and that he was a member and officer of the Union. Further evidence of respondent's knowledge of Yockmen's union activities is the list of prominent union members, including Yockmen, which

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[7] That such interrogation of an employee about his union activities during an organizational campaign is in violation of Section 8(a)(1) of the Act, and not protected by the "free speech" proviso of Section 8(c), is well settled law. *N.L.R.B. v. Harrah's Club*, 362 F. 2d 425, cert. denied, 368 U.S. 915; *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 904 (C.A. 9).

respondent kept in its blackjack pit.[8] As soon as the Union made its presence felt at the casino – by having the Nevada Industrial Commission investigate Yockmen's accident – the Company fired him.

At the hearing, the Company conceded that the reason given Yockmen for his discharge was a pretext, but argued that the real motive which it sought to mask was, not its opposition to his union activities, but its concern that he had become a "security risk." Thus, it appeared that ten months before his discharge, Yockmen had lost about $1,000 in a gambling spree at other casinos. Because of the losses, he was unable to pay all his outstanding non-gambling debts, and he went to Daly, his immediate supervisor, explained his problem, and asked whom he should see to secure advances against his salary. Daly referred Yockmen to Lucretia Rozelle, the Tropicana paymistress. (R. 49; Tr. 301).

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[8] It is well settled that by thus giving an employee the impression that his union activities are being closely watched, an employer engages in unlawful surveillance within the meaning of Section 8(a)(1) of the Act. *N.L.R.B. v. Security Plating Co., Inc.*, 356 F. 2d 725, 728 (C.A. 9); *Hendrix Mfg. Co. v. N.L.R.B.*, 321 F. 2d 100, 104-105 (C.A. 5); *Filler Products, Inc. v. N.L.R.B.*, 376 F. 2d 369, 374-375 (C.A. 4); *N.L.R.B. v. S & H Grossinger's, Inc.*, 372 F. 2d 26, 28 (C.A. 2) *N.L.R.B. v. Prince Macaroni Mfg. Co.*, 329 F. 2d 803, 805-806 (C.A. 1); *International Union of Electrical, etc., Workers v. N.L.R.B.*, 352 F. 2d 361, 362 (C.A. D.C.), cert. denied, 382 U.S. 902, enforcing 147 NLRB 809, 820 (statement that Company knew who signed cards); *N.L.R.B. v. Gotham Shoe Mfg. Co.*, 359 F. 2d 684, 685 (C.A. 2), enforcing 149 NLRB 862, 869, 870 (statement that Company knew how many employees attended a union meeting).

Yockmen gave the same explanation to the paymistress, and Rozelle agreed to let him have the "advances." [9] Yockmen received advances from time to time during the six or seven months before his discharge on September 1, 1964. The advances were paid by checks signed by Tropicana's chief auditor. The checks were distinctive in appearance from the normal payroll checks (R. 49; Tr. 305-306), and on at least two occasions, Daly noticed Yockmen with these checks and commented on them.

As noted above, the first evidence of management concern about these advances arose *after* Yockmen assumed an outstanding role for the Union. Moreover, in view of the complicity of the paymistress, the chief auditor, and Yockmen's immediate supervisor, none of whom were even reprimanded (Tr. 162), it could hardly be maintained that Yockmen was discharged for accepting advances. Rather, the Company contended that the advances evidenced financial difficulties which might prompt Yockmen to steal and hence after several months, suddenly rendered him a "security risk." The Board properly concluded that this assertion , like the reason given on his termination slip, was also a pretext.

In the first place, other employees at the Tropicana, including Daly, gambled and had non-gambling debts, but were not considered security risks because of this activity (R. 51;

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[9] A sign on the paymistress' door read 'Positively no advances in wages." Actually, the "advances" Yockmen received against his salary were drawn on wages already earned and not against wages not yet earned. The Tropicana pays its employees every two weeks, but always withholds a week's salary which is paid the employee upon termination. Thus, each draw by Yockmen represented wages that were due him on the date of the draw but which had been withheld by Tropicana (R. 50; Tr. 300, 318-319).

Tr. 174, 180-185). Nor was Yockmen's position particularly sensitive. The money which he was allegedly tempted to steal was contained in slot machines under repair. Yockmen's settled practice, however, was to have a supervisor check the coin level both before and after he worked on the machine (R. 49; Tr. 307), and both Farnow and Daly admitted on the stand that they never had reason to entertain the slightest suspicion that Yockmen was taking any of this money (R. 49; Tr. 245, 250). Moreover, since the real concern allegedly was Yockmen's financial situation, the significant facts would be how he got into debt and whether his situation was improving or worsening. Farnow in fact inquired into the circumstances, but only *after* he had discharged Yockmen (R. 50; Tr. 159-160, 189).

In sum, respondent's unlawful interrogation of Yockmen during the Union's organizational drive, its unlawful surveillance over Yockmen's union activities, its displeasure concerning Union Manager Hanley's processing the workmen's compensation claim, and the obviously pretextual reason given for Yockmen's discharge, all furnish ample support for the Board's finding that Yockmen was discharged for his union activity. See *Aeronca Mfg. Co. v. N.L.R.B.*, F. 2d , 66 LRRM 2574, 2576 (C.A. 9); *N.L.R.B. v. Harrah's Club*, 362 F. 2d 425, 428-430 (C.A. 9), cert. denied, 386 U.S. 915; *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F. 2d 466, 470 (C.A. 9); *N.L.R.B. v. Victory Plating Works, Inc.*, 325 F. 2d 92, 93 (C.A. 9); *N.L.R.B. v. Idaho Potato Processors, Inc.*, 322 F. 2d 573, 575 (C.A. 9); *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 907 (C.A. 9).

II.

THE BOARD PROPERLY REJECTED RESPONDENT'S ARGUMENTS THAT THE SECTION 8(a)(1) ALLEGATIONS WERE TIME-BARRED AND SHOULD HAVE BEEN DISMISSED.

The original charge was filed on September 29, 1964, alleging that the Company had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. More specifically, the charge alleged:

> On September 1, 1964, the above-named employer [Tropicana Hotel] discharged Frank Yockmen, who had been employed by it as a slot machine mechanic, because of his membership in, activities on behalf of, and sympathy for the below-named labor organization [American Federation of Casino and Gaming Employees] (GCX 1(a)).

On April 2, 1965, a complaint was issued, alleging not only the unlawful termination of Yockmen but also that respondent gave an employee the impression that respondent was engaging in surveillance of employees' union activities (GCX 1(a), II, V) in violation of Section 8(a)(1) of the Act. On August 5, 1965, the General Counsel moved to amend the complaint and add an additional violation of Section 8(a)(1) of the Act by respondent, alleging that respondent unlawfully interrogated Frank Yockmen (R. 42; Tr. 146, 151).

Before the Board, respondent moved to dismiss the independent Section 8(a)(1) violations because they had not been alleged in the charge. In *N.L.R.B. v. Osbrink*, 218 F. 2d 341, 345 (C.A. 9), cert. denied, 349 U.S. 928, this Court was faced with the arguments set forth by respondent in the instant case. Here, as in *Osbrink*, the complaint was issued on

a timely charge and the only question was whether an amendment or new allegation of unlawful conduct in the complaint was proper. Rejecting respondent's arguments in *Osbrink*, this Court recognized that where specific actions are alleged for the first time in the complaint, Section 10(b) "has been uniformly interpreted to authorize inclusion within the complaint of amended charges – filed after the six months' limitation period – which 'relate back' or 'define more precisely' the charges enumerated within the original and timely charge." *Id.* at 345. See also, *N.L.R.B. v. Dinion Coil Co.*, 201 F. 2d 484, 491 (C.A. 2); *N.L.R.B. v. Local 169, Industrial Division, Teamsters Union*, 228 F. 2d 425, 427-428 (C.A. 3).

The only relevant question, then, is whether the allegations of violations of Section 8(a)(1) of the Act in the complaint were sufficiently interwoven with the allegations in the charge as to permit such a "relation back." Clearly, these allegations – which merely added additional specific instances of unlawful conduct involving the same time period, the same employee, the same supervisors, the same objective – were allegations of unfair labor practices which were a continuation of and "in pursuance of the same objects" as the unfair labor practices already alleged. *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 369; *N.L.R.B. v. Fant Milling Co.*, 360 U.S. 301, 306-307. See *Texas Industries, Inc. v. N.L.R.B.*, 336 F. 2d 128,131-132 (C.A. 5), where the court permitted amendment of the complaint at the hearing to include specific Section 8(a)(1) violations which were not alleged in the charge or original complaint. Accord: *N.L.R.B. v. Kohler Co.*, 220 F. 2d 3, 6 (C.A. 7).

Respondent was in no way prejudiced by the procedure in the instant case. At no time did it contend that it was surprised or unable to defend itself against the charge, or even that it needed a continuance to prepare a defense. Indeed, the Company had the opportunity to examine both Farnow and

Yockmen, but never asked either of them about the incident. As to the unlawful surveillance, the respondent attempted to refute the charge by the testimony of George Harvey (Tr. 275-276). Further, respondent presented relevant legal argument in its exceptions and briefs to the Trial Examiner and Board. Clearly, therefore, the matters were fully litigated and the Company was not prejudiced by the absence of the Section 8(a)(1) charges in the original charge. Thus, as the Eighth Circuit recently stated in a related context, the existence of this violation was "a material issue which has been fairly tried by the parties [and] should be decided by the Board. . . ." *American Boiler Manufacturers Ass'n v. N.L.R.B.*, 366 F. 2d 815, 821.[10]

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[10] Before the Board, respondent also argued that Trial Examiner committed prejudicial error by permitting the counsel for the General Counsel to reopen his case after he had rested but before respondent had begun his defense in chief. Nowhere does respondent explain how this action by the Trial Examiner was prejudicial to respondent's interests. In the absence of such a showing, it is well settled that it is within the sound discretion of the judge conducting the trial whether or not to admit further evidence after the party offering the evidence has rested. *Simsirdag v. United States*, 315 F. 2d 230, 231 (C.A. 5) (criminal action). See also, 88 C.J.S. *Trial, Sec. 105, at 220 (1955).*

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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January 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

APPENDIX A

INDEX TO REPORTER'S TRANSCRIPT

(Numbers are to pages of reporter's transcript)

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GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
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WITNESSES FOR THE GENERAL COUNSEL

WITNESSES FOR RESPONDENT

STIPULATIONS AND MOTIONS

Type	Page Made	Ruling	Page Ruling
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Renewal of pretrial amendment to motions (See GCX 1(o))	10	—	—
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Type	Page Made	Ruling	Page Ruling
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APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise : * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practices, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business,

for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.